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International Law Commission
Fiftieth session
Geneva, 20 April–12 June 1998
New York, 27 July–14 August 1998

Draft report

Rapporteur: Mr. Christopher John Robert **Dugard**

Chapter I

Introduction

1. The International Law Commission held the first part of its fiftieth session at its seat at the United Nations Office at Geneva, from 20 April to 12 June 1998, and the second part at United Nations Headquarters in New York, from 27 July to 14 August 1998.

A. Membership

2. The Commission consists of the following members:

Mr. Emmanuel Akwei Addo (Ghana)

Mr. Husain Al-Baharna (Bahrain)

Mr. Awn Al-Khasawneh (Jordan)

Mr. Joao Clemente Baena Soares (Brazil)

Mr. Mohamed Bennouna (Morocco)

Mr. Ian Brownlie (United Kingdom)

Mr. Enrique J. A. Candioti (Argentina)

Mr. James Richard Crawford (Australia)

Mr. Christopher John Robert Dugard (South Africa)

Mr. Constantin P. Economides (Greece)

Mr. Nabil Elaraby (Egypt)

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Mr. Luigi Ferrari Bravo (Italy)

Mr. Zdzislaw Galicki (Poland)

Mr. Raul Ilustre Goco (Philippines)

Mr. Gerhard Hafner (Austria)

Mr. Qizhi He (China)

Mr. Mauricio Herdocia Sacasa (Nicaragua)

Mr. Jorge E. Illueca (Panama)

Mr. Peter C. R. Kabatsi (Uganda)

Mr. James Lutabanzibwa Kateka (United Republic of Tanzania)

Mr. Mochtar Kusuma-Atmadja (Indonesia)

Mr. Igor Ivanovich Lukashuk (Russian Federation)

Mr. Teodor Viorel Melescanu (Romania)

Mr. Václav Mikulka (Czech Republic)

Mr. Didier Opertti-Badan (Uruguay)

Mr. Guillaume Pambou-Tchivounda (Gabon)

Mr. Alain Pellet (France)

Mr. Pemmaraju Sreenivasa Rao (India)

Mr. Victor Rodríguez Cedeño (Venezuela)

Mr. Robert Rosenstock (United States)

Mr. Bernardo Sepúlveda (Mexico)

Mr. Bruno Simma (Germany)

Mr. Doudou Thiam (Senegal)

Mr. Chusei Yamada (Japan)

B. Officers and the Enlarged Bureau

3. At its 2519th meeting, on 20 April 1998, the Commission elected the following officers:

Chairman: Mr. Joao Clemente Baena Soares

First Vice-Chairman: Mr. Igor Ivanovich Lukashuk

Second Vice-Chairman: Mr. Raul Ilustre Goco

Chairman of the Drafting Committee: Mr. Bruno Simma

Rapporteur: Mr. Christopher J. R. Dugard

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairman of the Commission[1] and the Special Rapporteurs.[2]

5. On the recommendation of the Enlarged Bureau, the Commission set up a Planning Group composed of the following members: Mr. I. Lukashuk (Chairman), Mr. A. Addo, Mr. N. Elaraby, Mr. L. Ferrari Bravo, Mr. Z. Galicki, Mr. R. Ilustre Goco, Mr. Q. He, Mr. J. E. Illueca, Mr. J. L. Kateka, Mr. M. Kusuma-Atmadja, Mr. D. Opertti-Badan, Mr. E. Pambou-Tchivounda, Mr. B. Sepúlveda, Mr. D. Thiam, and Mr. C. J. R. Dugard (*Ex-officio*).

C. Drafting Committee

6. The Commission established a Drafting Committee, composed of the following members for the topics indicated:

Prevention of transboundary damage from hazardous activities: Mr. B. Simma (Chairman), Mr. P. S. Rao (Special Rapporteur), Mr. E. A. Addo, Mr. H. Al-Baharna, Mr. E. J. A. Candioti, Mr. C. P. Economides, Mr. L. Ferrari Bravo, Mr. Z. Galicki, Mr. G. Hafner, Mr. P. C. R. Kabatsi, Mr. R. Rosenstock, Mr. G. Pambou-Tchivounda, Mr. C. Yamada and Mr. C. J. R. Dugard (*Ex-officio*).

State responsibility: Mr. B. Simma (Chairman), Mr. J. Crawford (Special Rapporteur), Mr. E. A. Addo, Mr. M. Bennouna, Mr. I. Brownlie, Mr. E. J. A. Candioti, Mr. C. P. Economides, Mr. L. Ferrari-Bravo, Mr. Z. Galicki, Mr. G. Hafner, Mr. Q. He, Mr. J. L. Kateka, Mr. I. I. Lukashuk, Mr. T. V. Melescanu, Mr. R. Rosenstock, Mr. V. Rodriguez Cedeño, Mr. C. Yamada and Mr. C. J. R. Dugard (*Ex-officio*).

Reservations to treaties: Mr. B. Simma (Chairman), Mr. A. Pellet (Special Rapporteur), Mr. A. Addo, Mr. A. Al-Khasawneh, Mr. I. Brownlie, Mr. E. J. A. Candioti, Mr. C. P. Economides, Mr. Z. Galicki, Mr. G. Hafner, Mr. Q. He, Mr. M. Herdocia Sacasa, Mr. P. C. R. Kabatsi, Mr. J. L. Kateka, Mr. I. I. Lukashuk, Mr. T. V. Melescanu, Mr. V. Mikulka, Mr. R. Rosenstock, Mr. V. Rodriguez Cedeño and Mr. C. J. R. Dugard (*Ex-officio*).

7. The Drafting Committee held a total of ___ meetings on the three topics indicated above.

D. Working groups

8. The Commission also established the following Working Groups composed of the members indicated:

(a) *State responsibility*: Mr. B. Simma (Chairman), Mr. J. Crawford (Special Rapporteur), Mr. Constantin P. Economides, Mr. Nabil Elaraby, Mr. L. Ferrari Bravo, Mr. Z. Galicki, Mr. Q. He, Mr. G. Pambou-Tchivounda, Mr. R. Rosenstock, Mr. C. Yamada and Mr. J. Dugard (*Ex-officio*);

(b) *Unilateral acts of States*: Mr. E. Candioti (Chairman), Mr. V. Rodriguez Cedeño (Special Rapporteur), Mr. C. Economides, Mr. L. Ferrari Bravo, Mr. P. C. R. Kabatsi, Mr.

[1] Mr. A. Pellet.

[2] Mr. M. Bennouna, Mr. J. R. Crawford, Mr. V. Mikulka, Mr. A. Pellet, Mr. P. S. Rao and Mr. V. Rodriguez Cedeño.

(c) *Nationality in relation to succession of States*: Mr. V. Mikulka (Chairman; Special Rapporteur), Mr. E. A. Addo, Mr. H. Al-Baharna, Mr. I. Brownlie, Mr. E. J. Candioti, Mr. C. P. Economides, Mr. Z. Galicki, Mr. G. Hafner, Mr. R. Rosenstock and Mr. J. Dugard (*Ex-officio*);

(d) *Prevention of transboundary damage from hazardous activities*: Mr. C. Yamada (Chairman), Mr. P. S. Rao (Special Rapporteur), Mr. E. A. Addo, Mr. E. J. A. Candioti, Mr. C. P. Economides, Mr. L. Ferrari Bravo, Mr. G. Hafner, Mr. G. Pambou-Tchivounda, Mr. B. Simma and Mr. J. Dugard (*Ex-officio*);

(e) *Diplomatic protection*: an open-ended Working Group under the chairmanship of Mr. M. Bennouna (Special Rapporteur);

(f) *Future topics*: Mr. I. Brownlie (Chairman), Mr. R. I. Goco, Mr. Q. He, Mr. M Herdocia Sacasa, Mr. V. Mikulka, Mr. D. Opertti-Badan, Mr. B. Sepúlveda and Mr. B. Simma.

E. Secretariat

9. Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, opened the session and represented the Secretary-General. Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Manuel Rama-Montaldo, Deputy Director of the Codification Division acted as Deputy Secretary to the Commission. Ms. Mahnoush H. Arsanjani, Senior Legal Officer, served as Senior Assistant Secretary to the Commission; Ms. Christiane Bourloyannis-Vrailas, Mr. David Hutchinson, Mr. George Korontzis and Ms. Virginia Morris, Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

10. At its 2519th meeting, on 20 April 1997, the Commission adopted an agenda for its fiftieth session consisting of the following items:

1. Organization of work of the session.
2. State responsibility.
3. International liability for injurious consequences arising out of acts not prohibited by international law. (Prevention of transboundary damage from hazardous activities.)
4. Reservations to treaties.
5. Diplomatic protection.
6. Unilateral acts of States.
7. Programme, procedures and working methods of the Commission and its documentation.
8. Cooperation with other bodies.
9. Date and place of the fifty-first session.
10. Other business.

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Chapter X
Other decisions and conclusions of the Commission

A. Programme, procedures and working methods of the Commission and its documentation

1. Planning of the work of the current session

1. The plan was that at the beginning of the session, a two-day seminar would be held to commemorate the fiftieth anniversary of the Commission. The first part of the session in Geneva should then be devoted to the discussion of the reports submitted by the Special Rapporteur with respect to the topics on the agenda of the Commission, whereas the second part of the session in New York should be used for the adoption of draft articles (with regard to reservations, State responsibility and international liability) and of the report of the Commission.

2. Work programme of the Commission for the remainder of the quinquennium

2. The Commission affirmed that the work programme for the remainder of the quinquennium set out by the Commission in its report on the work of its forty-ninth session[1] should be complied with to the extent possible.

[1] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), paras. 220 and 221.

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3. Making available Special Rapporteur's reports prior to the session of the Commission

3. Reference was made to the recommendation contained in the report of the Commission at its forty-eighth session[2] that it would be "highly desirable that all reports should be available to Commission members some weeks before the commencement of the session, to enable study and reflection." Taking into account the time required for the editing, translation, reproduction and distribution of documents (normally six weeks prior to the session), the Commission decided that Special Rapporteurs should submit their reports to the Secretariat in time so as to ensure their prompt availability in all languages before the beginning of the session. In this connection, the Commission further decided that, in future cases, candidates for Special Rapporteur should be reminded of the demands that would be made in terms of time and effort upon their appointment.

4. The Commission stressed the advisability that the Secretariat be requested to send to all members of the Commission a copy of the letter sent to Special Rapporteurs reminding them of the deadline set for the submission of their reports. The Commission also requested the Secretariat to distribute to all members, upon receipt of the report and after its editing, the Special Rapporteur's report in the language submitted.

4. Organization of the fifty-first session

5. With reference to the suggestion contained in paragraph 224 of its report on the forty-ninth session, which stated that to enhance efficient organization of the work, the membership for the following session of the Bureau, or at least, the Chairman and the Chairman of the Drafting Committee, should be agreed upon at the end of a session rather than at the beginning of a session as had been the case,[3] the Planning Group took note that the Eastern European Group would nominate the chairmanship of the Commission and the Latin American Group would nominate the chairmanship of the Drafting Committee. Members were urged to consult so as to complete the nomination process.

B. Commemoration of the fiftieth anniversary of the Commission

6. Pursuant to a decision of the Commission at its forty-ninth session,[4] a seminar was held at Geneva on 21 and 22 April to commemorate the fiftieth anniversary of the Commission. The theme of the seminar was the critical evaluation of the Commission's work and lessons learned for its future, which was discussed by five panels focusing upon the following topics: (a) overview of the work of the International Law Commission 1948–1998: international responsibility and liability – comments on the Commission's approach; (b) State immunities: current problems inherited from the past?; (c) law of treaties: questions remain open; (d) future topics; (e) problems of the international legislative process and uses and perils of codification. Members of the academic community, diplomats and legal advisers of Governments and international organizations were invited to participate in the discussion.

7. The proceedings of the seminar will be published and disseminated to interested institutions for the purpose of wider appreciation of international law.

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[2] Ibid., *Fifty-first Session, Supplement No. 10* (A/51/10), para. 191.

[3] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), para. 224.

[4] Ibid., para. 229. The General Assembly welcomed this decision in paragraph 19 of its resolution 52/156.

8. *Making Better International Law: The International Law Commission at 50* was published in June 1998 to commemorate the fiftieth anniversary of the establishment of the Commission. It contained the proceedings of the Colloquium on the Progressive Development and Codification of International Law held on 28 and 29 October 1997. The Secretary-General provided the preface to the publication, which was divided into three parts: Part I, oral presentations of papers and open-floor discussion, organized according to the following themes: (a) overview of the international law-making process and the role of the International Law Commission; (b) major complexities encountered in contemporary international law-making; (c) selection of topics for codification and progressive development by the Commission and its working methods; (d) the Commission's work and the shaping of international law; enhancing the Commission's relationship with other law-making bodies and relevant academic and professional institutions; (e) making international law more relevant and readily available; (f) the influence of the International Court of Justice on the work of the International Law Commission and the influence of the Commission on the work of the Court. Part II contained the written submissions of papers received. Part III reproduced the decisions and conclusions of the Commission on its programme, procedures and working methods adopted at its forty-eighth session and the statute of the International Law Commission in both English and French.

9. The *Analytical Guide to the Work of the International Law Commission, 1949–1997* was published in July 1998 as a contribution by the Codification Division to commemorate the fiftieth anniversary of the Commission, and complements the publication, *The Work of the International Law Commission*, currently in its fifth edition. The Guide is intended as a tool to facilitate research into the Commission's contribution to the codification and progressive development of international law during its first 50 years of existence. The Guide is organized by topics, subdivided into categories and stages of consideration within the Commission, allowing the reader to trace the development of each topic from inception to conclusion.

10. The International Law Commission Web site was created by the Codification Division, to commemorate the fiftieth anniversary of the Commission. The primary purpose of the Web site is to disseminate information regarding the activities of the Commission to as wide an audience as possible, through the electronic medium. As more of the documents and reports of the Commission are transformed into an electronic format and posted on the Internet, the Web site will also serve as a supplement to the published hard-copy versions of those documents and reports. It includes the following: information on the fiftieth session of the Commission: an introduction to the Commission, including a brief historical synopsis; information regarding the composition and membership of the Commission, and its activities during its forty-eighth, forty-ninth and fiftieth sessions; a discussion of its programme of work; online copies of the reports of the Commission, as well as of various texts adopted by the Commission, or based on its work; and an online version of the *Analytical Guide to the Work of the International Law Commission, 1949–1997*. This Web site will be maintained by the Division.

C. Long-term programme of work

11. The Planning Group took note of the report of the Working Group (ILC(L)/WG/LTPW/CRP.1/Rev.1) and the Group's recommendation to continue its work at the next session (the report of the Working Group is contained in annex ___ to the present report).

D. Representation of the Commission at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

12. Having regard to the draft statute for an international criminal court, prepared by the Commission and submitted to the General Assembly at its forty-ninth session,[5] the Commission decided to designate Mr. James Crawford to represent the Commission at the Conference. Mr. Crawford addressed the Conference on 16 June 1998 and reported to the Commission on 27 July 1998.

13. On 27 July 1998, the Secretary of the Commission, who was the Executive Secretary of the Conference, transmitted the text of the following resolution adopted by the Conference in this regard:

> "*The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*
>
> "*Resolves* to express its deep gratitude to the International Law Commission for its outstanding contribution in the preparation of the original draft of the Statute, which constituted the basis for the work of the Preparatory Committee."

E. Cooperation with other bodies

14. At the 2537th meeting of the Commission, on 28 May 1998, Mr. Tang Chengyan, Secretary-General of the Asian-African Legal Consultative Committee (AALCC), expressed the Committee's continued interest in the topics currently on the ILC's agenda. As regards State responsibility, he informed the Commission that the law relating to countermeasures had been discussed in a seminar organized by AALCC in Tehran in January 1998 on "International extraterritorial application of national legislation: sanctions imposed against third parties". On reservations to treaties, a special meeting had been organized in the course of the thirty-seventh session of AALCC held at New Delhi. Other topics on the agenda of the Commission discussed by AALCC included: prevention of transboundary damage from hazardous activities; nationality in relation to the succession of States; and unilateral acts of States. At the same session, AALCC had also considered such other topics as the establishment of an international criminal court and the law of international rivers and the framework convention on the non-navigational uses of international watercourses. AALCC would continue to maintain a close working relationship with the Commission.

15. At the 2554th meeting of the Commission, on 3 August 1998, Mr. Jonathan T. Fried, observer for the Inter-American Juridical Committee (IAJC), informed the Commission of current activities of the Committee. IAJC had recently been involved in studies concerning the legal dimension of integration and international trade, in particular the most-favoured-nation clause as well as the right to information, including access to information and the protection of personal data. Furthermore, the Committee prepared a draft convention against corruption, which was later adopted by the Organization of American States (OAS), and was developing model laws regarding illicit enrichment and transnational bribery. Other topics with which the IAJC had been recently involved include enhancing the administration of justice in the Americas, inter-American cooperation against terrorism, the application of the United Nations Convention on the Law of the Sea by States of the hemisphere, a draft

[5] Ibid., *Forty-ninth Session, Supplement No. 10* (A/49/10), para. 91.

declaration on the rights of indigenous peoples as well as democracy in the inter-American system.

16. At the 2558th meeting, on 7 August 1998, Mr. Rafael A. Benitez, observer, informed the Commission of the work and activities of the Ad Hoc Committee of Legal Advisors on Public International Law (CAHDI) of the Council of Europe. The Committee had established a working group of specialists on reservations to treaties which met in Paris in February 1998 and was to meet again in September 1998. Among the questions tackled or to be tackled by the group are the admissibility of reservations, the role of treaty bodies, the effects of illicit reservations and the practice of the members of the Council of Europe concerning reservations to treaties. The group would bear specially in mind the work being carried out by the Commission in this area. On the question of State practice relating to State succession and issues of recognition, CAHDI decided in March 1998 to prepare a report, in cooperation with some other institutions, aimed at analysing the practice of States members of the Council of Europe.

17. At the 2538th meeting, on 10 June 1998, Judge Stephen Schwebel, President of the International Court of Justice, gave the Commission an analytical account of the cases currently before the Court. He pointed out that the expanded caseload had inevitably led to increasingly lengthy delays in hearing cases. On average, States could now expect to wait about four years between initial filing and final judgement. Such delays had understandably given rise to a certain restiveness both inside and outside the Court. The basic problem was that the resources at the Court's disposal had not increased in line with the demand for its services and had even in recent years been cut. Consequently, the size of the translation services and archives department was not adequate, the Judges at the Court did not have clerks, nor was there a corps in the Registry designed to assist them individually and the number of legal staff was very small. The Court, for its part, had taken a number of steps to expedite its procedures. States were being encouraged, for example, to submit their pleadings consecutively rather than simultaneously and to curb the proliferation of annexes to pleadings which tended to absorb a disproportionate amount of translation time. Regarding the Court's making use of draft articles produced by the International Law Commission, the President pointed out that, over the years, the Court had habitually attached considerable importance to the conventions elaborated by the Commission. Although draft articles were only drafts and therefore could not be accorded the same weight, in cases where the parties to a dispute agreed that certain draft articles were an authoritative statement of the law on a particular point, the Court gave relevant weight to them.

18. On 9 June 1998, an informal working session was held between members of the Commission and of the legal services of the International Committee of the Red Cross (ICRC) and of the International Federation of Red Cross and Red Crescent Societies, to discuss common interests of these bodies.

F. Date and place of the fifty-first session and of the subsequent sessions

19. The Commission agreed that its next session would be held at the United Nations Office at Geneva from 3 May to 23 July 1999 (12 weeks). Taking into account the Commission's expected volume of work in sessions subsequent to 1999 and the need to organize its work in the most productive manner, the Commission also agreed that, barring unforeseen circumstances, sessions subsequent to 1999 should be scheduled to take place in two rather evenly split parts, with a reasonable period in between, for a total of 12 weeks, in Geneva. Accordingly, the Secretariat was requested to undertake the necessary administrative and budgetary requests in the light of that decision. In this connection, the

Secretary of the Commission made a statement regarding the possible requirement of expenditure.

20. The Commission, on the recommendation of the Planning Group, decided to hold its session in 2000 at Geneva from 24 April to 2 June and from 3 July to 11 August 2000.

G. Representation at the fifty-third session of the General Assembly

21. The Commission decided that it should be represented at the fifty-third session of the General Assembly by its Chairman, Mr. Joao Clemente Baena Soares.

H. International Law Seminar

22. Pursuant to General Assembly resolution 52/156, the thirty-fourth session of the International Law Seminar was held at the Palais des Nations from 11 to 29 May 1998. The Seminar is for advanced students specializing in international law and for young professors or government officials intended for an academic or diplomatic career or posts in the civil service in their country.

23. Twenty-three participants of different nationalities, mostly from developing countries, were able to take part in the session.[6] The participants in the Seminar observed plenary meetings of the Commission, attended specially arranged lectures and participated in working groups on specific topics.

24. The Seminar was opened by the Chairman of the Commission, Mr. Joao C. Baena Soares.

25. The following lectures were given by members of the Commission: Mr. Pemmaraju S. Rao: "The work of the ILC"; Mr. Zdzislaw Galicki: "Nationality as a human right"; Mr. Mohamed Bennouna: "Diplomatic protection"; Mr. James Crawford: "State responsibility"; Mr. Teodor Melescanu: "Economic sanctions".

26. Lectures were also given by Mr. Vladimir Petrovsky, Secretary-General of the Conference on Disarmament and Director-General of the United Nations Office at Geneva (UNOG): "Multilateral disarmament"; Mr. Roy S. Lee, Director, Codification Division, Office of Legal Affairs and Secretary to the International Law Commission: "The establishment of the International Criminal Court: Legal problems"; Mr. Michel Moussalli, Former Director, Office of the United Nations High Commissioner for Refugees: "The international protection of refugees"; Mr. Stéphane Jeannet, Legal Adviser, International Committee of the Red Cross: "International humanitarian law and the work of the ICRC";

[6] The following persons participated in the thirty-fourth session of the International Law Seminar: Ms. Irene Abessolo (Gabon); Mr. Agalar Atamoglanov (Azerbaijan); Mr. Yen The Banh (Viet Nam); Mr. Kesab Prasad Bastola (Nepal); Mr. Gela Bezhuashvili (Georgia); Mr. Mohamed Bouqentar (Morocco); Ms. Irena Cacic (Croatia); Ms. Mélanne Civic (United States of America); Mr. Juan Norberto Colorado Correa (Colombia); Ms. Patricia Galvao Teles (Portugal); Mr. Zafar Iqbal Gondal (Pakistan); Mr. Fernando Herera Rodriguez (Mexico); Mr. Kumbirai Hodzi (Zimbabwe); Ms. Alba Ibrahimi (Albania); Mr. Ali Reza Jahangiri (Islamic Republic of Iran); Mr. Gilberto Marcos A. Rodrigues (Brazil); Mr. Alejandro Moreno Diaz (Venezuela); Ms. Dewi Naidu (Denmark); Mr. Samuel Nerquaye-Tetteh (Ghana); Mr. Giovanni Palec (Philippines); Ms. Suranjika Tittawella (Sri Lanka); Ms. Jeannette Tramhel (Canada); Mr. Mncedisi Xego (South Africa). One additional selected candidate (from Zambia) did not attend. A Selection Committee, under the chairmanship of Professor Nguyen-Huu Tru (Honorary Professor, Graduate Institute of International Relations, Geneva), met on 11 March 1998 and selected 24 candidates out of 75 applications for participation in the Seminar.

Mr. Mojtaba Kazazi, Chief Governing Council Secretariat, United Nations Compensation Commission: "Security Council action: The work of United Nations Compensation Commission".

27. Seminar participants were assigned to one of four working groups for studying particular topics under the guidance of Commission members, as follows: "Reservations to treaties in domestic law" (Mr. Pellet); "Unilateral acts" (Mr. Candioti); "Diplomatic protection" (Mr. Hafner); and "State responsibility" (Mr. Dugard). Each group presented its findings to the Seminar; two groups presented papers, on "Unilateral acts of States" and on "Diplomatic protection", which were also shared with members of the Commission.

28. Participants were also given the opportunity to make use of the facilities of the United Nations Library and of the UNHCR Visitors' Centre, and to visit the museum of the ICRC.

29. The Republic and Canton of Geneva offered its traditional hospitality to the participants after a guided visit of the Alabama and Grand Council rooms.

30. Mr. Joao C. Baena Soares, Chairman of the Commission, Mr. Ulrich von Blumenthal, on behalf of the United Nations Office at Geneva, and Ms. Patricia Galvao Teles, on behalf of the participants, addressed the Commission and the participants at the close of the Seminar. Each participant was presented with a certificate of attendance.

31. The Commission noted with particular appreciation that the Governments of Denmark, Finland, Germany, Hungary, Ireland, Switzerland and Venezuela had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. Thanks to those contributions, it was possible to award a sufficient number of fellowships to achieve adequate geographical distribution of participants and to bring from developing countries deserving candidates who would otherwise have been prevented from taking part in the session. In 1998, full fellowships (travel and subsistence allowance) were awarded to 15 candidates and partial fellowship (subsistence only) to 4 candidates.

32. Of the 760 participants, representing 144 nationalities, who have taken part in the Seminar since 1965, the year of its inception, 426 have received a fellowship.

33. The Commission stresses the importance it attaches to the sessions of the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 1999 with as broad a participation as possible.

34. The Commission noted with satisfaction that in 1998 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services will be provided for the Seminar at the next session, despite existing financial constraints.

I. Gilberto Amado Memorial Lecture

35. The fourteenth Memorial Lecture, in honour of Gilberto Amado, the illustrious Brazilian jurist and former member of the Commission, was given on 13 May 1998 by Ambassador Ramiro Saraiva Guerreiro, former Minister of External Relations of Brazil, on the subject "The creation of the International Law Commission and some considerations on supposed new sources of international law".

36. The Gilberto Amado Memorial Lectures have been made possible through the generous contributions of the Government of Brazil, to which the Commission expressed its gratitude. It requested the Chairman to convey its gratitude to the Government of Brazil.

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INTERNATIONAL LAW COMMISSION
Fiftieth session
Geneva, 20 April-12 June 1998
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INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

(PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES)

Titles and texts of draft articles 1 to 17 on Prevention of transboundary damage from hazardous activities adopted by the Drafting Committee

Article 1

Activities to which the present draft articles apply

The present draft articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2

Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "harm" includes harm caused to persons, property or the environment;

(c) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

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(d) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft article 1 are carried out;

(e) "State likely to be affected" means the State in the territory of which the significant transboundary harm is likely to occur or which has jurisdiction or control over any other place where such harm is likely to occur.

Article 3[4]*

Prevention

States shall take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm.

Article 4[6]

Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of one or more international organization in preventing, or in minimizing the risk of, significant transboundary harm.

Article 5[7]

Implementation

States shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present draft articles.

Article 6[8]

Relationship to other rules of international law

Obligations arising from the present draft articles are without prejudice to any other obligations incurred by States under relevant treaties or rules of customary international law.

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* The number within square brackets indicates the number of the corresponding article proposed by the Working Group in 1996.

Article 7[9 and 11]

Prior authorization

1. The prior authorization of a State is required for activities within the scope of the present draft articles carried out in its territory or otherwise under its jurisdiction or control as well as for any major change in an activity so authorized. Such authorization shall also be required in case a change is planned which may transform an activity into one falling within the scope of the present draft articles.

2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present draft articles.

3. In case of a failure to conform to the requirements of the authorization, the authorizing State shall take such actions as appropriate, including where necessary terminating the authorization.

Article 8[10]

Impact assessment

Any decision in respect of the authorization of an activity within the scope of the present draft articles shall be based on an evaluation of the possible transboundary harm caused by that activity.

Article 9[15]

Information to the public

States shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present draft articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 10[13]

Notification and information

1. If the assessment referred to in article 8[10] indicates a risk of causing significant transboundary harm, the State of origin shall, pending any decision on the authorization of the activity, provide the States likely to be affected with timely notification thereof and shall transmit to them the available technical and other relevant information on which the assessment is based.

2. The response from the States likely to be affected shall be provided within a reasonable time.

Article 11[17]

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent, or minimize the risk of, causing significant transboundary harm.

2. States shall seek solutions based on an equitable balance of interests in the light of article 12[19].

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of States likely to be affected in case it decides to authorize the activity to be pursued at its own risk, without prejudice to the rights of any State likely to be affected.

Article 12[19]

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 11[17], the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and the availability of means of preventing such harm, or minimizing the risk thereof or of repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;

(d) the degree to which the States of origin and, as appropriate, States likely to be affected are prepared to contribute to the costs of prevention;

(e) the economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(f) the standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

Article 13[18]

Procedures in the absence of notification

1. If a State has reasonable grounds to believe that an activity planned or carried out in the territory or otherwise under the jurisdiction or control of another State may have a risk of causing significant transboundary harm, the former State may request the latter to apply the provision of article 10[13]. The request shall be accompanied by a documented explanation setting forth its grounds.

2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 10[13], it shall so inform the other State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations in the manner indicated in article 11[17].

3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a period of six months unless otherwise agreed.

Article 14[14]

Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all available information relevant to preventing, or minimizing the risk of causing, significant transboundary harm.

Article 15[16]

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 16[20]

Non-discrimination

Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of activities within the scope of the present draft articles, a State shall not discriminate on the basis

of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Article 17

Settlement of disputes

1. Any dispute concerning the interpretation or application of the present draft articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties, including submission of the dispute to mediation, conciliation, arbitration or judicial settlement.

2. Failing an agreement in this regard within a period of six months, the parties concerned shall, at the request of one of them, have recourse to the appointment of an independent and impartial fact-finding commission. The report of the commission shall be considered by the parties in good faith.

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State responsibility

Draft articles provisionally adopted by the Drafting Committee

Part One ...

Chapter I. General principles

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

[Article 2]

[Possibility that every State may be held to have committed an internationally wrongful act]

[deleted]

Article 3

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) Is attributable to the State under international law; and

(b) Constitutes a breach of an international obligation of the State.

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Article 4

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Chapter II. The act of the State under international law

Article 5

Attribution to the State of the conduct of its organs

1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State.

[Article 6]

[deleted]

Article 7

Attribution to the State of the conduct of entities exercising elements of the governmental authority

The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question.

Article 8

Attribution to the State of conduct in fact carried out on its instructions or under its direction or control

The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 8 *bis*

Attribution to the State of certain conduct carried out in the absence of the official authorities

The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 9

Attribution to the State of the conduct of organs placed at its disposal by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it had been placed.

Article 10

Attribution to the State of the conduct of organs acting outside their authority or contrary to instructions

The conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, such organ or entity having acted in that capacity, shall be considered an act of the State under international law even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise.

Articles 11 to 14

proposed deletion

Article 15

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement, which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles ... 5 to ... 10.

Article 15 *bis*

Conduct which is acknowledged and adopted by the State as its own

Conduct which is not attributable to a State under articles 5, 7, 8, 8 *bis*, 9 or 15 shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Article A

Responsibility of or for conduct of an international organization

These draft articles shall not prejudge any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

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Draft report of the International Law Commission on the work of its fiftieth session

Rapporteur: Mr. Christopher John Robert **Dugard**

Chapter III

Specific issues on which comments would be of particular interest to the Commission

1. In response to paragraph 12 of General Assembly resolution 52/156 of 15 December 1997, the International Law Commission would like to indicate the following specific issues for each topic on which expressions of views by Governments either in the Sixth Committee or in written form would be of particular interest in providing effective guidance for the Commission on its further work.

A. Diplomatic protection

2. The Commission would welcome the comments and observations by Governments on the conclusions drawn by the Working Group contained in paragraph ... of the report.

3. The Commission would also request Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection.

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B. Unilateral acts of States

4. The Commission would welcome comments on whether the scope of the topic should be limited to declarations, as proposed by the Special Rapporteur in his first report, or whether the scope of the topic should be broader than declarations and should encompass other unilateral expressions of the will of the State.

5. Comments are also welcome on whether the scope of the topic should be limited to unilateral acts of States issued to other States, or whether it should also extend to unilateral acts of States issued to other subjects of international law.

C. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)

6. Given the fact that the Commission intended to separate activities that have a risk of causing significant harm from those that actually cause such a harm for the purpose of developing and applying the duty of prevention, the question arises as to the kind of regime that is or should be made applicable to the latter type of activities.

7. It is generally understood so far that the duty of prevention is an obligation of conduct and not of result. Accordingly, it is suggested that non-compliance with duties of prevention in the absence of any damage actually occurring would not give rise to any liability. Now that the Commission decided to recommend a regime on prevention, separating the same from a regime of liability, should the duty of prevention be treated as an obligation of conduct or failure to comply be responded with suitable sanctions under the law of State responsibility or civil liability or both where the State of origin and the operator are both accountable for the same? If the answer to the latter question is in the affirmative, what type of sanctions are appropriate or applicable?

8. Now that the Commission completed its work on the duty of prevention, should it deal with the regime of liability as earlier envisaged because of the integral link established under the original scheme of the topic? Alternatively, should the topic of liability be treated as an entirely distinct and different topic not linked to the duty of prevention?

9. What form should the draft articles take – a convention, framework convention or a model law?

D. State responsibility

10. With respect to part one of the draft, is all conduct of an organ of a State attributable to that State under article 5, irrespective of the *jure gestionis* or *jure imperii* nature of the conduct?

11. As regards part two of the draft, what is the appropriate balance to be struck between the elaboration of general principles concerning reparation and of more detailed provisions, in particular relating to compensation?

E. Nationality in relation to the succession of States

12. The Commission would welcome comments on the question raised in paragraph 11 of the report of the Working Group (see annex) as regards the future of the second part of the topic of nationality in relation to the succession of States dealing with legal persons.

13. The Commission further wishes to reiterate its request to Governments for written comments and observations on the draft articles on nationality of natural persons in relation to the succession of States adopted on first reading in 1997, so as to enable it to begin the second reading of the draft articles at its next session.

F. Reservations to treaties

14. The Commission would welcome comments and observations by Governments on whether unilateral statements by which a State purports to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself, would or would not be considered as reservations.

15. The Commission would appreciate receiving any information or materials relating to State practice on such unilateral statements.

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Rapporteur: Mr. Christopher John Robert **Dugard**

Chapter II

Summary of the work of the Commission at its fiftieth session

1. The International Law Commission considered the preliminary report of the Special Rapporteur on the topic of "Diplomatic protection", which dealt with the legal nature of diplomatic protection and the nature of the rules governing the topic. It established a working group to consider possible conclusions which might be drawn on the basis of the discussion on the approach to the topic and also to provide directions in respect of issues which should be covered by the report of the Special Rapporteur for the next session of the Commission. At the conclusion of its report, the working group suggested that the Special Rapporteur, in the second report, should concentrate on the issues raised in Chapter I, "Basis for diplomatic protection", of the outline proposed by the working group last year.[1]

2. As regards the topic, "Unilateral Acts of States", the Commission examined the first report of the Special Rapporteur. The discussion concentrated mainly on the scope of the topic, the definition and elements of unilateral acts, the approach to the topic and the final form of the Commission's work thereon. There was general endorsement for limiting the topic to unilateral acts of States issued for the purpose of producing international legal effects and for elaborating possible draft articles with commentaries on the matter. The Commission requested the Special Rapporteur, when preparing his second report, to submit draft articles on the definition of unilateral acts and the scope of the draft articles and to proceed further with the examination of the topic, focusing on aspects concerning the elaboration and conditions of validity of the unilateral acts of States.

[1] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10, para. 189).

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3. Concerning the topic, " International liability for injurious consequences arising out of acts not prohibited by international law", the Commission adopted on first reading, a set of 17 draft articles with commentaries on prevention of transboundary damage from hazardous activities (chapter VI) and decided to transmit the draft articles to Governments for comments and observations.

4. With regard to the topic, "State responsibility", the Commission considered the first report of the Special Rapporteur, which dealt with general issues relating to the draft, the distinction between "crimes" and "delictual" responsibility, and articles 1 to 15 of part one of the draft. The Commission established a working group to assist the Special Rapporteur in the consideration of various issues during the second reading of the draft articles. The Commission decided to refer draft articles 1 to 15 to the Drafting Committee. The Commission took note of the report of the Drafting Committee on articles 1, 3, 4, 5, 7, 8, 8 *bis*, 9, 10, 15, 15 *bis* and A. The Commission also took note of the deletion of articles 2, 6 and 11 to 14.

5. As regards the topic, "Nationality in relation to the succession of States", the Commission considered the fourth report of the Special Rapporteur and established a working group to consider the question of the possible orientation to be given to the second part of the topic dealing with the nationality of legal persons (chapter VIII). The preliminary conclusions of the working group are annexed to the present report.

6. With respect to the topic, "Reservations to treaties", the Commission considered the third report of the Special Rapporteur concerning the definition of reservations (and interpretative declarations). The Commission adopted seven draft guidelines on definition of reservations, object of reservations, instances on which reservations may be formulated, reservations having territorial scope, reservations formulated when notifying territorial application, reservations formulated jointly and the relationship between definitions and admissibility of reservations.

7. As regards the programme of work of the Commission for the remainder of the quinquennium, the Commission affirmed that the programme set out at its forty-ninth session should be complied with to the extent possible (chapter X, section B).

8. The working group on the long-term programme of work should continue its work at the next session (chapter X, section C).

9. The Commission also decided that Special Rapporteurs should submit their reports in time so as to ensure their prompt availability in all languages before the beginning of the session (chapter X, section D).

10. The Commission was represented at the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Conference expressed its deep gratitude to the International Law Commission (chapter X, section E).

11. The Commission commemorated its fiftieth anniversary by (a) holding a seminar on critical evaluation of the Commission's work and lessons learned for its future; (b) being presented with two publications, namely: "Making Better International Law: the International Law Commission at 50" and "Analytical Guide to the Work of the International Law Commission, 1949–1997"; and (c) the creation of the International Law Commission website maintained by the Codification Division (chapter X, section F).

12. A useful dialogue on subjects of common interest were conducted with the International Court of Justice, the Asian-African Legal Consultative Committee, the Inter-American Juridical Committee and the ad hoc Committee of Legal Advisers on Public International Law of the Council of Europe (chapter X, section J).

13. A training seminar was held with 23 participants, all of different nationalities (chapter X, section K).

14. A memorial lecture was given in honour of Mr. Gilberto Amado, a former Brazilian member of the Commission (chapter X, section L).

15. The Commission agreed that its next session be held at the United Nations Office at Geneva from 3 May to 23 July 1999, and that its session for the year 2000 be held from 24 April to 2 June 2000 and from 3 July to 11 August 2000 (chapter X, section H).